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No. 94-1966

In The
Supreme Court of the United States
October Term, 1995

DWIGHT J. LOVING, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Was the President's promulgation of constitutionally-required aggravating factors for death penalty offenses in the military (a) executed pursuant to an implicit delegation of legislative authority by Congress; (b) if there was such a delegation, did Congress do so with sufficient specificity to establish the policy and limits of the delegated authority; and, (c) would such a delegation violate the doctrine of separation of powers?

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BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division (the Division) represents Navy and Marine Corps personnel on appellate review of court-martial convictions. The Division currently represents four appellants who have been sentenced to death, more than any other branch of the Armed Services. The issues presented in the *Loving* case are of particular interest to the Division because these issues will directly impact appellate review of the four death sentences currently adjudged in the Navy and Marine Corps. Moreover, if recent history is any guide, the Navy and Marine Corps can expect at least one capital court-

martial annually. Thus, the Court's resolution of these issues is of utmost importance to presently death-sentenced service members and future capital accused. As required by Rule 37, the Division has sought and obtained consent of both parties prior to filing this brief.

SUMMARY OF ARGUMENT

The Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946, as enacted by Congress in 1950, authorized the death penalty for several offenses. In 1983, the Court of Military Appeals held that the military's means of imposing the death penalty was no longer valid in light of this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). *United States v. Matthews*, 16 M.J. 354, 380 (C.M.A. 1983). In 1984, the President promulgated Rule for Courts-Martial (R.C.M.) 1004, as part of the 1984 Manual for Courts-Martial. R.C.M. 1004 establishes procedures for capital cases, and includes, in section 1004(c), a list of aggravating factors which determine death penalty eligibility.

Amicus contends that the promulgation of R.C.M. 1004(c) was unconstitutional. Only Congress is authorized to legislate aggravating factors for death penalty cases. Congress has not delegated to the President, either explicitly or implicitly, the authority to promulgate aggravating factors in military capital cases. Furthermore, even if Congress did delegate to the President the authority to promulgate R.C.M. 1004(c), such delegation was contrary to the Framers' intent and violated the nondelegation doctrine because Congress provided insufficient guidance and limitations on the delegated authority. Moreover, even if Congress attempted to delegate the authority to promulgate R.C.M. 1004(c) to the President, such attempt would violate the separation of powers doctrine because it would be contrary to the

Framers' intent and would concentrate excessive power in the Executive Branch, while undermining Congress' authority to legislate aggravating factors for military capital cases.

ARGUMENT

I. THE PRESIDENT'S PROMULGATION OF AGGRAVATING FACTORS FOR DEATH PENALTY OFFENSES WAS PERFORMED WITHOUT A DELEGATION OF CONGRESS' LEGISLATIVE AUTHORITY.

A. DEATH PENALTY IN THE MILITARY.

Following this Court's decision in *Furman* and *Gregg*, the Court of Military Appeals held that the military's means of imposing the death penalty was no longer valid where there was no "specific findings as to individualized aggravating circumstances." *Matthews*, 16 M.J. at 380. The court further opined that this flaw in the military justice system could be remedied by either the President or Congress promulgating aggravating factors. *Id.* at 380-81. It was the President who established the aggravating factors that must be found in capital courts-martial. R.C.M. 1004(c).

In promulgating R.C.M. 1004, the President elevated certain offenses under the UCMJ to capital status in an attempt to bring the military's death penalty scheme in line with this Court's decision in *Furman* and *Gregg*. *See* UCMJ art. 85, 10 U.S.C. § 885 (authorizing death for desertion in time of war); UCMJ art. 94, 10 U.S.C. § 894 (authorizing death for mutiny and sedition); UCMJ art. 99, 10 U.S.C. § 899 (authorizing death for certain actions of misbehavior before the enemy); UCMJ art. 100, 10 U.S.C. § 900 (authorizing death for a subordinate who compels a

surrender); UCMJ art. 101, 10 U.S.C. § 901 (authorizing death for the improper use of a countersign during a time of war); UCMJ art. 102, 10 U.S.C. § 902 (authorizing death where an individual violates the protection of persons, property, or places of the enemy where a "safeguard" has been posted); UCMJ art. 104, 10 U.S.C. § 904 (authorizing death for aiding the enemy); UCMJ art. 113, 10 U.S.C. § 913 (authorizing death for the misbehavior of a sentinel or lookout during a time of war); UCMJ art. 118, 10 U.S.C. § 918 (authorizing death for premeditated or felony murder); and, UCMJ art. 120, 10 U.S.C. § 920 (authorizing death for rape).

Congress has legislated only two codal provisions that, by their own force, empower a court-martial to adjudge death--UCMJ art. 106, 10 U.S.C. § 906 (mandatory death sentence for spying in time of war); and, UCMJ art. 106a, 10 U.S.C. § 906a (specifically listing aggravating factors for espionage offenses).

B. ARTICLE 36.

Amicus recognizes that Congress has delegated **some** power to the President, permitting him to prescribe procedural rules as well as modes of proof. *See* UCMJ art. 36(a), 10 U.S.C. § 836(a). Congress, however, did not delegate the function at issue here, nor could it do so without violating the doctrine of separation of powers. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Even if Congress could delegate the power to prescribe aggravating factors, it did not do so under Article 36.

Article 36 authorizes the President to prescribe procedural rules and "modes of proof," not the aggravating factors which by their own force render certain military accused death-eligible. In other words, the aggravating factors delineated in R.C.M. 1004 are substantive rules because they alone determine which accused service

members may be executed for their offenses. As such, they should have been the product of legislative rather than executive action. *See Whalen v. United States,* 445 U.S. 684, 689 (1980) ("the legislative power, including the power to . . . prescribe punishments to be imposed . . . resides wholly in Congress."); *cf. Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[T]he discretion to delimit the categories of crimes justifying detention, like the discretion to define criminal offenses and prescribe punishments, resides wholly with the state legislatures.").

Notably, Article 36 directs the President to prescribe procedural rules in a manner consistent with "the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States District Court." UCMJ art. 36(a), 10 U.S.C. § 836(a). R.C.M. 1004, however, is directly contrary to current practice in U.S. District Court where Congress alone prescribes the aggravating factors for capital offenses. *See* 18 U.S.C. § 3592 (prescribing aggravating factors applicable in federal civilian capital proceedings). Thus, Article 36 did not authorize the specific rules at issue here because they do not conform to current practice in federal district court. *See generally Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) (discussing the scope of the President's procedural rule-making power under Article 36).

C. IMPLIED DELEGATION/RATIFICATION.

The lower court has held that Congress implicitly delegated to the President its authority to legislate aggravating factors, and ratified the President's promulgation of R.C.M. 1004 when it enacted UCMJ art. 106a, 10 U.S.C. § 906a, specifically providing aggravating factors for espionage cases. *United States v. Curtis*, 32 M.J. 252, 263 (C.M.A. 1991). Article 106a lists three aggravating factors and then states "[a]ny other factor that may be prescribed by the President by regulations under

section 836 of this title (article 36)." UCMJ art. 106a, 10 U.S.C. § 906a. It is this language and the lack of "any legislative effort at that time to undo [the President's] action" in which the lower court found an implicit delegation and ratification. *Curtis*, 32 M.J. at 262-63.

This legal analysis is flawed. Congress does not ratify legislation through inaction. Congress affirmatively acts through "the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Immigration & Naturalization Service v. Chada*, 462 U.S. 919, 957 (1983). Congress needs to affirmatively legislate aggravating factors as it did in Article 106a, because "[s]uch decisions cannot be assumed by acquiescence or non-action." *Greene v. McElroy*, 360 U.S. 474, 507 (1959)(citing *Kent v. Dulles*, 357 U.S. 116 (1958)).

Concerning implied delegation and ratification in an area of questioned constitutionality, this Court has held that legislative action:

> [M]ust be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, [citation omitted] but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Greene 360 U.S. at 507. Thus, those servicemen sentenced to death pursuant to the President's promulgation of R.C.M. 1004 have been sentenced without the

consideration, input, and approval of Congress, the only branch of government charged with enacting the law.

D. HISTORICAL ANALYSIS.

Even assuming that Congress may implicitly rather than explicitly delegate authority, it is clear that when Congress established the UCMJ in 1950, it did not intend to delegate any authority to the President to establish aggravating factors in capital cases. Indeed, a careful review of Congressional history from the beginning of this nation and the legislative history of the UCMJ defeats any possibility of an implicit delegation to the President, as Commander in Chief, to determine which service members would be eligible for a death sentence.

From the first Articles of War in 1775, Congress completely prohibited the trial of service members in military courts for non-military capital offenses and otherwise only allowed trial by courts-martial for civil offenses which were prejudicial to good order and discipline. The first time that Congress expanded military jurisdiction and allowed the military to try service members for civilian offenses, regardless of whether they were capital or non-capital and regardless of prejudice to good order and discipline, was in 1863.

Because of the disruption caused by the Civil War many civil courts in the South were closed, so the military was authorized to try soldiers for purely civil offenses, including the capital offenses of murder and rape. *Lee v. Madigan*, 358 U.S. 228, 233 (1959). In the act of March 3, 1863, entitled "An Act for enrolling and calling out the national forces, and for other purposes," Congress provided, in pertinent part:

> That *in time of war, insurrection, or rebellion,* murder [and other specifically named offenses] . . . shall be punishable by the sentence of a general court-martial

> or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and *the punishment for such offenses shall never be less than those inflicted by the laws of the State, territory, or district in which they have been committed.*

Coleman v. Tennessee, 97 U.S. 509, 513 (1878) (quoting 12 Stat. 736) (emphasis added).[1] The Court interpreted this provision to mean that the military had jurisdiction to try these purely civil offenses only when "as a result of the existence of martial law or military operations, the courts of the state were not open and military power was therefore needed to enforce the state law." *Caldwell v. Parker,* 252 U.S. 376, 386 (1920). The Court held, therefore, that the statute had no application when "the civil courts were open and in the undisturbed exercise of its jurisdiction." *Id.* (quoting *Coleman,* 97 U.S. at 515).

The provisions of the 1863 statute were formally incorporated in Article 58 of the Articles of War of 1874 with only minor changes. At the same time, the provisions of the 1806 articles requiring delivery of service members to civilian authorities was harmonized by making it inapplicable in time of war or rebellion. Article 59. The "general article" was also included in the 1874 Articles as Article 62. Construing the phrase "not capital" as found in Article 62 of the 1874 Articles of War, Colonel Winthrop, who has been referred to as "the leading nineteenth century authority on American military law", Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction,* 13 Vand. L. Rev. 435, 446 (1960), and the "Blackstone of Military Law," *Reid v. Covert,* 354 U.S. 1, 19 n.38 (1957),

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[1] The petitioner in *Coleman* had been sentenced to die by a general court-martial.

declared:

> The Article, by these words, expressly excluded from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed--whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death by the common law, or by a statute of the United States applicable to the case--as, for example, murder, arson, or rape.

2 William Winthrop, *Military Law and Precedents* 1120 (1896) (footnotes omitted) (emphasis in original). Moreover, this Court implicitly recognized that in order for a non-military offense to be tried by the military, the offense had to be one that prejudiced good order and discipline. *Ex parte Mason,* 105 U.S. 696 (1882). Specifically, the Court stated that the "gravamen of the military offence" charged in *Mason* "was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a [federal] jail over which he was standing guard." *Id.* at 698.

Subsequently, in 1916, at the urging of Major General Enoch Crowder, The Judge Advocate General of the Army, Congress extended court-martial jurisdiction to specified non-military offenses, such as larceny, robbery, and assault, regardless of prejudice to good order and discipline. Articles of War, 1916, art. 93. At the same time, Congress expressly provided that murder and rape were punishable by death in a court-martial, but rejected General Crowder's argument that jurisdiction over these offenses should also be unqualified. Duke & Vogel at 452-53. Instead Congress provided that "no person shall be tired by court-martial for murder or rape committed within the geographical limits of the States of the Union and the

District of Columbia in time of peace." Articles of War, 1916, art. 92; *see also Kahn v. Anderson,* 255 U.S. 1, 9-10 (1921).

In addition to these changes, Congress also deleted the requirement in the "general article" that in order to try service members for unspecified non-capital non-military offenses the offense had to be prejudicial to good order and discipline or service-discrediting. Articles of War, 1916, art. 96.[2] Thus, with the exception of capital offenses, Congress granted the military jurisdiction over virtually any offense committed by a service member. Moreover, Congress also eroded the requirement that for non-military offenses, the military deliver service members to civil courts upon application, by eliminating the requirement in cases where the service member was being held for court-martial. Articles of War, 1916, art. 74.[3]

While the Articles of War were extensively revised in 1920, the provisions relating to jurisdiction over non-military offenses remained substantially unchanged until the enactment of the UCMJ in 1950. In the UCMJ, Congress finally extended the military's jurisdiction to try service members for murder and rape within the geographical limits of the United States for capital offenses in peacetime. UCMJ arts. 118, 120(a), 10 U.S.C. §§ 918, 920(a). Strangely enough, this significant step was taken with only a single mention of the drastic change that was being made. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House of Comm. on Armed Services*, 81st Cong., 1st Sess. 644

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[2] In 1950, however, when numerous non-military offenses were specifically included within the jurisdiction of courts-martial, the requirement in the "general article" that unspecified offenses had to be prejudicial to good order and discipline or service-discrediting was added once again. UCMJ art. 134, 10 U.S.C. § 934.

[3] This provision was not included in the UCMJ at all.

(1949) (statement of Richard H. Wels, Chairman, Special Committee on Military Justice of the New York County Lawyer's Association).

The clear Congressional history of strictly prohibiting the peacetime trial of service members for non-military offenses committed within the geographical limits of the United States dispels any idea of an implicit delegation of authority to the President. In addition, the legislative history of the UCMJ also dispels this illusion. One of Congress' overriding concerns in 1950 was command influence,[4] which is reflected in a number of articles, including Article 37, 10 U.S.C. § 837 (unlawful command influence of the action of a court is prohibited) and Article 67, 10 U.S.C. § 867 (creation of an appellate court composed of civilian judges). Indeed, the legislative history reflects that command influence was "perhaps the most vital single point in military justice reform." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 626 (1949) (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Association of the City of New York). Moreover, the concern was "not so much that innocent men are convicted as that outrageously long sentences are given by the trial court." *Id.* at 840 (statement of Professor Arthur John Keeffe of Cornell Law School). Thus, one of Congress' primary concerns was that command influence would affect the punishment that a convicted service member received.

Given this overriding concern with command influence and the historical prohibition of military jurisdiction to try service members for non-military capital offenses, it is

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[4] Command influence is a term of art in the military, but generally implies a commander's improper influence based on rank and position of authority (either intentionally or unintentionally) on the decisions of court-martial members.

completely counterintuitive to infer that when Congress allowed the military to try service members for non-military capital offenses *for the very first time* that it also implicitly delegated authority to the President to determine which service members should be eligible for the newly authorized capital sentences.

II. WHEN CONGRESS DELEGATES ITS LEGISLATIVE AUTHORITY, IT MUST DO SO WITH SUFFICIENT SPECIFICITY TO ESTABLISH THE POLICY, GUIDELINES, AND LIMITS OF THE DELEGATED AUTHORITY.

A. THE NONDELEGATION DOCTRINE.

"All legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const. art. I, § 1. This legislative power, however, can be shared or delegated, but "[i]n determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination," and Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406, 409 (1928)).

If Congress were to delegate to the President the authority to establish aggravating factors, this delegation must meet the "intelligible principle" test before it will pass constitutional scrutiny. *Id.* This test requires that Congress delineate the general policy of the delegated authority, determine by whom and how the authority will be applied, and the boundaries that surround the authority. *Id.* at 372-

73.

Once Congress has established these principles, the delegation of legislative authority will be constitutionally sufficient and will not violate the nondelegation doctrine.

B. *MISTRETTA V. UNITED STATES.*

In *Mistretta* this Court determined the constitutionality of the Sentencing Guidelines promulgated by the U.S. Sentencing Commission. Congress delegated its legislative authority to promulgate these guidelines to the Sentencing Commission in the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. §§ 991-998.

In applying the "intelligible principle" test, this Court held that the statute was "sufficiently specific and detailed to meet constitutional requirements." *Id.* at 374. Specifically, Congress had charged the commission with three goals, specified four purposes of sentencing that must be pursued, prescribed a guidelines system for use in regulating sentencing, directed the commission to consider seven factors in the formulation of offense categories, and provided detailed guidance concerning categories of offenses and offender characteristics. *Id.* at 374-76. Congress clearly left no doubt concerning the breadth and scope of the delegated authority it was placing in the Sentencing Commission. This cannot be said for Article 36.

C. ARTICLE 36.

Article 36, provides:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be

> prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

18 U.S.C. § 836. This statute was enacted in 1950 and has not been significantly changed since then.[5] It is chronologically impossible for Congress to have intended to delegate to the President the authority to promulgate aggravating factors--to fulfill constitutional requirements of the Eighth Amendment--twenty-two years prior to this Court's decision in *Furman*. As a Congressional delegation, Article 36 does not contain sufficient specificity or detail upon which to base a proper delegation of authority. *Cf. Touby v. United States*, 500 U.S. 160 (1991). Article 36 does not "clearly delineate[ ] [a] general policy," nor does it establish "boundaries for the delegated authority." *Mistretta*, 488 U.S. at 373. If there is a general policy it would seem to only apply to "procedural" aspects of courts-martial and not to an open-ended legislative grant.

Article 36 was written in very broad terms with no limiting guidelines other than the President "shall, **so far as he considers practicable**, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 18

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[5] Article 36 received minor changes in 1979 and 1990. DOD Authorization Act of 1980, Pub. L. No. 96-107 93 Stat. 804; National Defense Authorization Act of 1991, Pub. L. No. 101-510, 104 Stat. 1485.

U.S.C. § 836 (emphasis added). The phrase "as he considers practicable" provides absolutely no boundaries within which the President is required to act or not to act. All the President need do is make a subjective determination that something is impracticable to justify a deviation from the law and rules recognized in U.S. District Court. Nor does this language place any limitations upon the President's ability to promulgate substantive rules which are better left to the legislature.

In evaluating the practice in the U.S. District Courts, only Congress has legislated constitutionally required aggravating factors. *See* 18 U.S.C. § 3592 (prescribing aggravating factors applicable in federal civilian capital proceedings). In fact, when a district court judge attempted to create aggravating factors, in an attempt to comply with this Court's decisions in *Furman* and *Gregg*, the Ninth Circuit held that the statute involved could "not be saved by judicial formulation of the missing, but essential, guidelines." *United States v. Harper*, 729 F.2d 1216, 1226 (9th Cir. 1984). The *Harper* court further concluded that the Constitution requires aggravating circumstances to be established by a legislature. *Id.* at 1225.

Article 36 offers no general policy statements, provides no limitations upon the delegated authority of the President, and provides no specified guidelines for the President to operate within. This forty-five-year-old statute does not delegate, let alone properly delegate, Congress' legislative authority to promulgate aggravating factors in capital cases. As such, the President exceeded his authority in promulgating R.C.M. 1004.

III. THE PRESIDENT'S PROMULGATION OF RULE FOR COURTS-MARTIAL 1004(c), ESTABLISHING AGGRAVATING FACTORS IN MILITARY DEATH PENALTY CASES, WAS AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS DOCTRINE AND IS CONTRARY TO THE INTENT OF THE FRAMERS OF THE CONSTITUTION.

A. R.C.M. 1004(c) CONCENTRATES TOO MUCH POWER IN THE EXECUTIVE BRANCH, WHILE UNDERMINING CONGRESS' AUTHORITY TO LEGISLATE COURT-MARTIAL DEATH PENALTY ELIGIBILITY.

The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches -- the Legislative, the Executive, and the Judicial -- placing both substantive and procedural limitations on each. *Metropolitan Washington Airports Auth. v. Citizens*, 501 U.S. 252, 272 (1991). This system of separated powers and checks and balances was regarded by the Framers as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). It is this concern for encroachment and aggrandizement that has animated this Court's separation of powers jurisprudence. *Mistretta*, 488 U.S. at 382.

The President's promulgation of aggravating factors in R.C.M. 1004(c) violates the separation of powers doctrine. It effects an unconstitutional accumulation of power in the Executive Branch. It also undermines Congress' authority to narrow, by legislation, the class of persons eligible for the military death penalty.

All legislative powers are vested in the Congress of the United States. U.S. Const. art. I, § 1. This includes the power to make rules for the government and regulation of the armed forces. *Id.* at § 8 cl. 14. The President, as Chief Executive, is authorized to execute the laws passed by Congress. U.S. Const. art II, § 1. He is also named Commander in Chief of the armed forces. *Id.* at § 2.

Narrowing the class of persons eligible for the death penalty by the promulgation of aggravating factors is a legislative function. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.") Prosecuting capital cases is an executive function.

By both promulgating aggravating factors and prosecuting military capital cases, the Executive Branch both makes and executes the law. Through R.C.M. 1004(c), the President determines the class of military offenders eligible for the death penalty. The convening authority, convenes the court-martial, UCMJ art. 22, 10 U.S.C. § 822, refers the charges to the court-martial, UCMJ art. 34, 10 U.S.C. § 834, and selects the members of the court-martial, UCMJ, art. 25, 10 U.S.C. § 825. The military judge, who has neither tenure nor the protection afforded by Article III of the U.S. Constitution, is designated by the service Judge Advocate General. UCMJ art. 26, 10 U.S.C. § 826; *Weiss v. United States*, 114 S.Ct. 752, 756 (1994). The President establishes the rules of evidence and procedure. *See* UCMJ art. 36, 10 U.S.C. § 836; Manual for Courts-Martial, United States, pts. II, III (1995 edition)(Rules for Courts-Martial and Military Rules of Evidence). The service appellate judges, lack tenure and Article III protection, and are appointed by the service Judge Advocates General. UCMJ art. 66, 10 U.S.C. § 866; *Weiss*, 114 S.Ct. at 756. The judges of the Court of Appeals for the Armed Forces are civilians, but lack

Article III status. UCMJ arts. 67, 141-145, 10 U.S.C. §§ 867, 941-945.

This scheme gives the Executive Branch too much power over the conduct of military capital litigation. The President determines death penalty eligibility in R.C.M. 1004(c) and his officers prosecute and review the cases. The convening authority, the members of the court-martial, and the trial and appellate judges are all Executive Branch officers. Certiorari review by this Court is the only possibility of direct review by an Article III court in a military death penalty case. UCMJ, art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259(3).

The power to determine military death penalty eligibility and the prosecution of military death penalty cases must be divided between the Executive and Legislative Branches. *Cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) ("The power to make necessary laws is in Congress; the power to execute in the President ... But neither can the President, in war more than peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President"). Under our constitution it falls to Congress to legislate rules and regulations for the government of the armed forces. U.S. Const. art I, § 8, cl. 14. Congress is therefore the branch that must promulgate aggravating factors. *Cf. Solorio v. United States*, 483 U.S. 435, 447-448 (1987)("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military ..."); *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)(The Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.").

If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. *Reid v. Covert*,

354 U.S. at 38-39. Such blending of functions in one Branch of Government violates the separation of powers doctrine. *Id.* at 39. In military capital litigation today, the President defines death penalty eligibility. He establishes the rules of procedure and evidence. Executive Branch officers prosecute, judge, and review the proceedings. This blending of functions in one Branch of Government violates the separation of powers doctrine and is therefore unconstitutional.

B. THE FRAMERS OF THE CONSTITUTION INTENDED THAT CONGRESS DETERMINE COURT-MARTIAL DEATH PENALTY ELIGIBILITY.

The Framers of the Constitution were cognizant and fearful of military courts-martial, *even* for members of the military. As this Court recognized, "The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history." *Reid v. Covert*, 354 U.S. at 23-24; *See also Lee v. Madigan*, 358 U.S. at 232 ("The attitude of the free society toward the jurisdiction of military tribunals -- our reluctance to give them authority to try people for nonmilitary offenses -- has a long history").

The Framers of the Constitution were aware of the history of courts-martial in seventeenth century England. Parliament recognized that in time of war the Executive had the prerogative power to adopt articles of war governing the military. Duke & Vogel at 442.

During the reign of Charles I, however, the Executive began to abuse the prerogative power and ignore the desires of Parliament. He tried citizen soldiers even during peacetime for non-military offenses. He attempted to rule the country through the army. Parliament expressed its outrage over the treatment of English citizens in the 1627

"Petition of Right" by declaring that Charles I had tried soldiers and sailors by court-martial in peacetime for "murder, robbery, felony mutiny or other outrage or misdemeanor," contrary to the common law. Duke & Vogel at 443 (quoting Petition of Right, 1627, 3 Car. 1, c. 1).

After Charles I, other Executives relied on the prerogative power and issued articles of war for the government of the military. These rulers, however, prohibited capital punishment by the military during peacetime. For example, in 1662, Charles II expressly withheld jurisdiction in capital cases. Duke & Vogel, at 443 n. 40. Likewise, in 1686, James II, although allowing court-martial jurisdiction for some civil offenses, "prohibited the infliction in time of peace, of any punishment amounting to loss of life or limb." Duke & Vogel, at 443 (citing Articles of War of James II, art. LXIV).

When William and Mary came to power in 1689, Parliament presented to them the Declaration of Rights, which was adopted as the Bill of Rights. One of the rights declared by Parliament was the right for the legislature and not the executive to control the military. "Thus, at one stroke the royal power to raise peace-time armies was severed and control over the army passed into the hands of Parliament." Duke & Vogel, at 444; *see also Reid*, 354 U.S. at 24-26.

Because of the Executive's abuse of the prerogative power, a number of influential legal scholars of the time, including Sir William Blackstone, argued that the military should not be allowed to try soldiers in peacetime. *Id.* at 26-27. For instance, Sir William Blackstone stated:

> martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The

> necessity of order and discipline in any army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the law of the land.

Id. (quoting 1 Blackstone's Commentaries 413).

Parliament did, however, allow the military to exercise a limited peacetime jurisdiction shortly after gaining control of the military. In the first Mutiny Act, Parliament allowed courts-martial in peacetime only for mutiny, sedition, and desertion, which were punishable by death. *Solorio*, 483 U.S. at 442 (citing Mutiny Act of 1689, 1 Wm. & Mary, ch. 5).

In addition to the Executive's abuses of military authority known to the Founders to have occurred in England, this country's own early history was marred by military excesses. As Samuel Adams wrote in 1768:

> [I]s it not enough for us to have seen soldiers and mariners forejudged of life, and executed within the body of the county by martial law? Are citizens to be called upon, threatened, ill-used at the will of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects, and contrary to the law and franchise of the land?

Reid, 354 U.S. at 27-28 (quoting 1 Wells, *The Life and Public Services of Samuel Adams*, 231).

Because of this history of Executive abuses, the Framers of the Constitution placed control of the military in the hands of Congress. The Framers clearly intended that Congress, not the Commander in Chief, make all policy judgments concerning what offenses and punishments were cognizable in courts-martial. Duke & Vogel at 447-48. *See also* Grant W. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian"*

Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L. Rev. 1, 18 (1969). "[T]hose who adopted the Constitution embodied their profound fear and distrust of military power [under control of the executive], as well as their determinations to protect trial by jury, in the Constitution and its Amendments." *Reid*, 354 U.S. at 29 (citing Art. I, §§ 8 and 9; Art. II, § 2; Art. III; and Amendments II, III, V, and VI); *see also Solorio*, 483 U.S. at 446 (English history shows a strong desire to transfer the control of court-martial jurisdiction from the executive to the legislature, thus in our Constitution "Congress, and not the Executive, was given authority to make rules for the regulation of the Armed Forces").

Moreover, the early American Articles of War promulgated by many of the same men who were involved in the framing of the Constitution reflects an intent to drastically limit military jurisdiction with respect to non-military offenses. The American Articles of War, drawn primarily from the British Articles of War in effect at the time, "reflect the plain purpose to confine the scope of courts-martial jurisdiction to the trial and punishment of military offenses." Duke & Vogel, at 445.

In the American Articles of War of 1775, drafted by a committee of five men, including George Washington, *see* Nelson & Westbrook at 13 n.71, the Framers strictly limited military jurisdiction to military offenses which were prejudicial to good order and discipline. Desertion in combat and betraying the password to the enemy were the only capital offenses. The maximum punishment for any other offense was thirty-nine lashes. Lieutenant Keith J. Allred, Comment, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 Nav. L. Rev. 153, 155-56 (1986). Shortly after the adoption of these Articles, however, George Washington's Judge Advocate General, Colonel William Tudor, petitioned Congress to adopt a stricter code, because they were unable to punish even treason with

more than 39 lashes. *Id.* at 156. In 1776, the Articles were revised "with a single end in view, military discipline." *Id.* at 157. In the revised 1776 Articles of War, reported to Congress by John Adams and Thomas Jefferson, Nelson & Westbrook at 13 n.71, a number of strictly military offenses were made punishable and the number of purely military capital offenses was increased to fourteen.[6] The maximum punishment for other offenses was increased to 100 lashes. Allred at 157-58.

With respect to non-military offenses, Section 50 of the 1775 Articles of War provided: "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and discipline, though not mentioned in the . . . articles of war, are to be taken cognizance of by a . . . court-martial . . . and punished at their discretion." No provision was made, however, to determine whether the military or civil jurisdiction had primary jurisdiction for civil offenses which also were prejudicial to good order and discipline. Allred at 160. This oversight was corrected in 1776 by granting primary jurisdiction to civil courts. Section X, Article 1 required the commanding officer to deliver over to civil magistrates any officer or solider accused of "a capital crime, or of having used violence, or . . . any offense against the persons or property of the good people of the United States, such as is punishable by the known laws of the land" upon application made by or in behalf of the injured party.

A few commentators believe that this provision of the Articles of War merely granted civilian authorities priority

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[6] The capital offenses were: mutiny, failure to suppress a mutiny, desertion, false alarms, violence to traders, cowardice, misbehavior before the enemy, casting away arms, imparting the watchword to persons not entitled to receive it, forcing a safeguard, relieving the enemy, holding correspondence with the enemy, leaving one's post or the colors in search of plunder, and forcing surrender. Allred at 158 n.40.

of prosecution and that military courts had concurrent jurisdiction. *Solorio*, 483 U.S. at 444 (citing Nelson & Westbrook, at 14). The commonly accepted view, however, is that unless the civil offense was included within the "general article" as an offense "to the prejudice of good order and military discipline", then the military had no jurisdiction over non-military offenses. *See, e.g.*, Francis T. McCoy, *Equal Justice for Servicemen: The Situation Before and Since O'Callahan v. Parker*, 16 N.Y.L.F. 1, 5 (1970).

The "general article" of the Articles of War of 1776, just like Section 50 of the 1775 Articles of War, allowed court-martial jurisdiction over service members for non-military offenses only for "[a]ll crimes not capital." American Articles of War of 1776, Section XVIII, Article 5, reprinted in 2 Winthrop 1503.[7] Regardless of other disputes concerning the nature of the military jurisdiction granted by these articles, it is clear that the "general article" excluded by its very terms capital crimes, which were numerous. Thus, the military could try service members for murders that could be classified as conduct "prejudicial to good order and discipline," but the service member could not be subjected to capital punishment because jurisdiction under the "general article" extended only to non-capital offenses. Francis T. McCoy, *Due Process for Servicemen -- The Military Justice Act of 1968*, 11 Wm. & Mary L. Rev. 66, 67 (1969); *see also Grafton v. United States*, 206 U.S. 333, 348 (1907) (under the 1776 Articles of War, no crimes of service members are excepted from military jurisdiction "except those that are capital in their nature").

In 1806, in the first Articles of War adopted after the

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[7] This article remained substantially unchanged throughout the nation's history and is now found in UCMJ art. 134, 10 U.S.C. 934. *Parker v. Levy*, 417 U.S. 733, 746 (1974).

ratification of the Constitution, Congress included similar provisions with respect to military jurisdiction over non-military offenses. *Caldwell v. Parker*, 252 U.S. at 382. Thus, from the beginning of this nation, capital offenses were withheld from military jurisdiction and "at the end of the eighteenth century all felonies committed in England with the exception for petty larceny and maiming were punishable by death." Duke & Vogel, at 447 n.61. Given this history, it is doubtful that the Framers of the Constitution ever envisioned that the military would be allowed peacetime jurisdiction to try service members for non-military capital offenses.

It is clear, however, that the Framers of the Constitution intended for Congress, not the Executive, to determine what service members would be eligible for capital punishment. This intent is reflected in the requirement that Congress legislate the rules and regulations for the government of the armed forces. *Solorio*, 483 U.S. at 447-48 ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . ."); *Chappell v. Wallace*, 462 U.S. at 301 (The Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline"). Thus, regardless of whether the Framers envisioned military jurisdiction in non-service related capital offenses, it is clear that the Framers never intended that the President be granted the authority to determine what service members would be eligible for the death penalty for commission of non-military capital offenses.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Honorable Court find unconstitutional the President's promulgation of constitutionally-required

aggravating factors for death penalty offenses in the military. Therefore, this Honorable Court should set aside Petitioner's sentence of death and remand the case to the lower court for further action.

Respectfully Submitted,

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